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IN THE

Supreme Court of the United States

NORTHWEST LOUISIANA FISH & GAME PRESERVE COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How can the federal navigational servitude legally apply above the normal or ordinary high water mark of the Red River, or extend to the Northwest Louisiana Fish and Game Preserve through a tributary that is not used for trade or commerce and a dam built by the State of Louisiana in 1931?

2. How can the courts justify granting a privilege without material basis to the public purpose of navigation while denying special protection to any other public uses, when just compensation for the taking of private property is a due process right guaranteed by the Fifth Amendment of the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

The Northwest Louisiana Fish & Game Preserve Commission (the "Preserve Commission") is the Louisiana state agency in possession of the Northwest Louisiana Fish and Game Preserve made up of Black Lake, Saline Lake, and Clear Lake in the Parish of Natchitoches, Louisiana. The Preserve Commission is the state entity responsible for the fish and game preserve situated in rural northwestern Louisiana made up of several lakes and contiguous land commonly referred to as Black Lake Complex.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
I. REVIEW IS WARRANTED TO ADDRESS THE MISAPPLICATION OF THE NAVIGATIONAL SERVITUDE TO THE FACTS OF THIS CASE	13
A. The Navigational Servitude Does not Extend to the Northwest Louisiana Fish and Game Preserve	13

Contents

Page

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN TREATMENT BETWEEN NAVIGATION AND OTHER PUBLIC USES, THE TAKING OF WHICH ARE COMPENSABLE UNDER THE UNITED STATES CONSTITUTION .. 23

CONCLUSION 30

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided July 31, 2009 ..... 1a

Appendix B — Opinion Of The United States Court Of Federal Claims Filed October 31, 2007 ..... 16a

TABLE OF CITED AUTHORITIES

Page

Cases:

Alameda Gateway, Ltd. v. U.S., 45 Fed.Cl. 757 (Fed.Cl.,1999) 13

Banks v. U.S., 2003 WL 18410 (C.A.Fed. 2003) ... 10, 11

Banks v. U.S., 71 Fed.Cl. 501 (Fed.Cl.,2006) 26

Boling v. U.S., 220 F.3d 1365 (C.A.Fed. 2000) .. 11

Boone v. U.S., 944 F.2d 1489 (C.A.9.Haw.,1991) 13, 14

Dardar v. Lafourche Realty Co., Inc., 985 F.2d 824 (C.A.5,1993) 27

Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233 (C.A.8,1979) 27

Federal Real Estate & Storage Co. v. U.S., 79 Ct.Cl. 667 (Ct.Cl.,1933) 27

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (C.A.10,2002) 25

Fruin-Colnon Corp. v. Vogt, 500 F.Supp. 606 (S.D.Ill.,1980) 27

Cited Authorities

Page

Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975) 17, 18

Kaiser Aetna v. U. S., 444 U.S. 164 (1979) 11, 12, 13, 21

Kingsport Horizontal Property Regime v. U.S., 46 Fed.Cl. (Fed.Cl.,2000) 16

Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074, 544 U.S. 528, 161 L.Ed.2d 876 (2005) 24

Lykes Bros., Inc., v. U.S. Army Corps of Engineers, 821 F.Supp. 1457 (M.D.Fla. 1993) 17

Maritrans Inc. v. U.S.; 342 F.3d 1344 (C.A.Fed.2003) 25

Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (C.A.Fed.,2009), 62 Fed.Cl. 760, 446 F.3d 1285, 79 Fed.Cl. 400 1

Owen v. U.S., 851 F.2d 1404 (C.A.Fed.,1988) 10, 11, 14, 15

Palm Beach Isles Assoc. v. U.S., 2003 WL 22937326 Fed.Cl.,2003 13

Cited Authorities

Page

Parm v. Shumate, 513 F.3d 135 (C.A.5.La.,2007) 26

Ridge Line, Inc. v. U.S., 346 F.3d 1346 (C.A.Fed.,2003) 25

Sarpy County, Neb. v. U. S., 386 F.2d 453, 181 Ct.Cl. 666 (Ct.Cl.1967) 29

State of Illinois v. U.S., 15 Cl.Ct. 399 (1988) ... 21

State of Wash. v. U.S., 214 F.2d 33 (C.A.9, 1954) 29

Tri-State Materials Corp. v. U.S., 550 F.2d 1 (Cl.Ct. 1977) 11, 14

U.S. v. 30.54 Acres of Land, More or Less, Situated in Greene County, Com. of Pa., 90 F.3d 790 (C.A.3,1996) 25

U.S. v. Ballinger, 395 F.3d 1218 (C.A.11.Ga.,2005) 26

U.S. v. Certain Parcels of Land in Kent County, Mich., 252 F.Supp. 319 (D.C.Mich. 1966) 28

U.S. v. Cress, 243 U.S. 316 (U.S. 1917) 17

U.S. v. Fuller, 93 S.Ct. 801, 409 U.S. 488, 35 L.Ed.2d 16 (1973) 24

Cited Authorities

Page

U.S. v. Gossler, 60 F.Supp. 971 (D.C.Or.1945) ... 27

United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) 21, 28

United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) 11, 16

U.S. v. Shahani-Jahromi, 286 F.Supp.2d 723 (E.D.Va.,2003) 26

U.S. v. Virginia Elec. & Power Co., 81 S.Ct. 784 (U.S.Va.,1961) 13

U. S. ex rel. Tenn. Valley Authority v. Welch, 66 S.Ct. 715, 327 U.S. 546, 90 L.Ed. 843 (1946) 25

U.S. v. Willow River Power Co., 324 U.S. 499(U.S. 1945) 19, 20, 21

Village of Norwood v. Baker, 19 S.Ct. 187, 172 U.S. 269, 43 L.Ed. 443 (1898) 24

United States Constitution:

U.S.C.A. Const.Amend. 5 .....i, 1, 23, 24

U.S.C.A. Const. Art. I § 8, cl. 2, 26

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C.A. § 2501 9

Other Authorities:

LA Op.Atty.Gen., No. 92-472 (Oct. 22, 1992) 2

La. R.S. 9:1101 2

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 574 F.3d 1386 (C.A.Fed.,2009). The government originally moved for judgment on the pleadings, which was granted by the United States Court of Federal Claims, Nancy B. Firestone, 62 Fed.Cl. 760. Following reversal of the judgment and remand, 446 F.3d 1285, the government again moved for judgment on pleadings. The United States Court of Federal Claims, 79 Fed.Cl. 400, granted the government's motion. On appeal, the Federal Circuit, Rader, Circuit Judge, held that the property interests of petitioner, the Preserve Commission, in the lake and contiguous lands were subservient to the navigational servitude and affirmed, *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 574 F.3d 1386 (C.A.Fed.,2009). Judge Rader also filed an Additional View.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const.Amend. 5.

"No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A. Const. Art. I § 8, cl. 3.

Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATEMENT OF THE CASE

The fish and game preserve at issue was created on 1926 as a wildlife and fisheries habitat and recreational area for the citizens of the State. The purpose of the preserve is to provide Louisiana residents and visitors with use and enjoyment. The Preserve Commission functions as the entity to effectuate and protect those objectives.

Black Lake Complex, is connected to Red River by a tributary called Saline Bayou, through which flood waters were historically released and the lake was periodically drawn down in order to facilitate maintenance of the preserve. At one end of the tributary is Allen Dam, which was constructed by the State of Louisiana shortly after the creation of the fish and game preserve.

Title to the land around and under the lake, as well as the lake itself, is held by the State of Louisiana. The State owns and has owned lakes and lake beds to the exclusion of others by virtue of its inherent sovereignty since 1812, the date of admission to the union, and then by enactment of specific legislation in 1910. Op.Atty.Gen., No. 92-472 (Oct. 22, 1992); La. R.S. 9:1101.

The Preserve Commission is a state created agency, or "political subdivision," that is charged with all regulation, enforcement, and adjudication pertaining to Black Lake Complex. The Preserve Commission has the explicit right, power, and authority to sue and be sued as a subdivision of the State.

Further, petitioner also makes rules and regulations to administer the preserve, regulates and controls the taking of fish and game from the preserve, establishes closed seasons, fixes fish and game limits, employs wardens, builds roads, provides camps and boats, fixes fees for hunting and fishing, as well as State licenses, regulates the building and location of duck blinds, issues licenses and permits, enforces prohibitions contained in its rules and regulations, leases to commercial fishing organizations, employs all necessary labor, establishes fish hatcheries, and does all things necessary to conserve and propagate fish and game in the preserve. The Preserve Commission has the explicit power and authority to "buy, lease, or sell properties necessary to the establishment and maintenance or improvement of the said Preserve." In short, the Preserve Commission has the property rights generally associated with ownership.

Respondent, through the United States Corps of Engineers ("Corps"), erected five locks and dams along Red River to increase its depth and facilitate navigation. Between Lock No. 3 and Lock No. 4 is the navigation pool in question, Pool 3, to which Black/Clear Lake is connected by the tributary. Pool 3 was originally designed to have a water level of 87 MSL, the maximum

level determined by the Corps' New Orleans District to avoid ground water damage and associated claims for damages.

However, the level of Pool 3 was eventually raised to 95 MSL. Although property and property rights along the river were acquired by or on behalf of the Corps, no rights were acquired related to petitioner's interest in the area. Damage to Black Lake Complex caused by the artificially maintained level of the river occurred after the event of complete impoundment of Pool 3.

In July of 1995, the Corps' Vicksburg District Project Review Board reviewed and endorsed the Final Project Management Plan, which outlined "remaining project requirements" as of January 1995. The Plan contained the following provision:

> (7) aa. *Pool 3 Lakes*
>
> Three State-owned lakes adjacent to Pool 3, Nantachie, Clear-Black, and Saline, will be impacted to varying degrees by the impoundment of the 95 foot navigation pool above Lock and Dam No. 3. The most significant impact to the lakes is associated with the ability to draw the lakes down by gravity flow for aquatic weed control and fisheries management. However, other aspects such as structural stability of the lake dams and project induced flooding have also been investigated.

> Subsequently, additional detailed design has been initiated and this design effort and construction have been added to the project scope, cost, and schedule. Also, added as a remaining requirement was a five year lake monitoring study which was part of the recommended plan in the approved DM 44E. This study monitors water quality and fisheries to determine the effects of operation of the navigation pool. The study has been initiated and is scheduled to be completed in 1998.

After 1995, the loss and damages which eventually gave rise to this litigation as a result of the raising of the level of Pool 3 to 95 MSL gradually began to occur. In late 1996, the Preserve Commission requested the Red River Water Way Commission to obtain assistance from the Corps in a proposed draw down of Black/Clear Lake based on concrete data that the lake complex was having an adverse impact from the project.

The Corps refused to cooperate, despite having maintained in the past that such data would be heeded and despite provisions of its own Project Management Plan. The Corps denied the Preserve Commission's request because navigation would allegedly be impeded by a draw down.

By early 1997, petitioner began encountering a severe hydrilla infestation of Black Lake Complex, making some parts of the preserve all but useless for recreational purposes. Now, more than ten years later, the condemnation of Black Lake Complex has only increased with more infestation.

Historically, the petitioner had been able to control fish populations and aquatic vegetation by drawing down the lake complex through the tributary that connects the lakes to Red River. However, petitioner was unable to draw down the lake for the first time 1997, because the United States Corps of Engineers ("Corps") had recently completed a project to raise the Mean Sea Level (MSL) of the Red River eight feet through a series of locks and dams that created navigational pools. Raising the level of the Red River had a domino effect that eventually resulted in the permanent taking of the lake complex. What resulted was a gradual deterioration of the preserve, as follows: impoundment of the navigational pool was the governmental act, severe hydrilla infestation was the direct but delayed result, and gradual loss of use of the property was the damage suffered by petitioner.

The nature of the consequential damage of the increased pool level is best described by the Corps in a letter dated December 20, 1999, addressed to the Executive Director of the Red River Waterway Commission in which the Corps acknowledges that they received complaints in 1996 from landowners concerned about the effects of the project to improve navigation of Red River. The Chief of the Corps Real Estate Division stated, "We initially attributed this to the fact that the pool had recently been impounded (Feb 1995) and the extended high water mark that occurred during mid 1995 and early 1996. We then entered a drier period with no complaints from landowners in Pool 5 concerning project impacts." The Chief went on to explain that it was not until early 1998 that they again started receiving information that the new pool level was adversely

affecting land in the vicinity of the pool, which motivated the Corps to start an investigation into the post project impacts. The Corps concluded that lands above the ordinary high water elevation were being impacted for which owners were not compensated. The letter referenced maps depicting "new inundated areas" and suggested that "there is a possibility that additional affected areas could be identified in the future." Identical problems and complaints were associated with Pool 3.

The loss of the ability to draw down the lake through the tributary to the level of the ordinary high water mark of the Red was not the only problem for petitioner caused by the actions of the government. The elevation of the navigational pool significantly increased the tailwater condition of the tributary and Black Lake Complex, thereby reducing flood control of the lake. The higher tailwater in the lakes' tributary caused by a higher mean sea level of Pool 3 disabled the discharge capacity of Black/Clear Lake through the spillway.

The increased level of the water table around Pool 3 is evidenced by the geological investigation of the vicinity performed by Geotechnical Testing Laboratory in October of 1996 at the request of the Red River Waterway Commission. The report generated by the investigation of the troublesome ground water and subsurface conditions demonstrated a relatively high water condition around Pool 3 attributable to the

level of the navigational pool of Red River. The investigators found that

> "the subsurface water regime is subject to change with variations in climatic conditions and possibly flow levels within adjacent waterway. It is not possible to predict future groundwater fluctuations based upon single, short-term observations. Long-term monitoring of groundwater conditions with respect to river flow levels and precipitation rates will be required to evaluate correlations between the various influences."

The problem with an increased water table was and is compounded by the lost ability to draw down the lake through Allen Dam and the lakes' tributary. Additionally, petitioner has experienced a drastic increase of land flooding from the Lake as a result of the raising of the water level of Pool 3. But most importantly, the continuous high water level of Black/Clear Lake has resulted in an ongoing and increasingly severe problem with aquatic growth, namely hydrilla and coontail, which has rendered the northern part of the lake virtually useless. A large portion of the lake is not even accessible by boat. Managing fish populations has been severely impaired, and the situation continues to deteriorate exponentially. The last scheduled draw down of Black Lake occurred in the Fall of 1994, before the completion of the project to raise the elevation of navigational pool to 95 MSL. That draw down was successful in keeping the Black Lake Complex functional, but that was more than fourteen years ago.

On January 8, 1997, the Preserve Commission called a special meeting and passed a resolution to permit pursuing litigation against the Red River Waterway Commission and the Corps. The meeting was precipitated by the aforementioned denial of the Preserve Commission's written request for the Corps to assist in a proposed draw down of Black/Clear Lake. As previously stated, the Corps denied responsibility for the Preserve Commission's loss, the Corps rejected the Preserve Commission's request based on the contention that navigation would be impeded by a draw down.

For the last decade, the Preserve Commission has consistently pursued compensation from the federal government for the loss of use of land and water, and the taking and destruction of petitioner's property, as a result of the raising of the water level of Pool 3 from 87 MSL to 95 MSL and the artificial maintenance of the river at the higher level. Previously, petitioner alleged damages in the estimated amount of 26 million dollars based on an appraisal by the Corps assessing the cost to restore the subject property and use of the property known as Black Lake Complex. However, with the passage of time, that estimation becomes less and less realistic as an adequate amount to address the taking suffered by petitioner.

In March of 2004, respondent filed a motion for judgment on the pleadings on several grounds, only one of which the Court of Federal Claims held was grounds for dismissal: suit was time-barred under 28 U.S.C.A. § 2501. Petitioner appealed to the Federal Circuit Court of Appeal, which held that the taking did not occur as

soon as Pool 3 was elevated to 95 MSL, therefore, the gradual process instigated by respondent's activity resulted in a permanent taking less than six years before commencement of petitioner's case.

On remand, the lower court subsequently granted the government's motion on grounds of navigational servitude. The Preserve Commission appealed because based on the facts in evidence and applicable law, it defies legal precedence for the lower court to have found that the federal navigational servitude extends from Red River to Black Lake Complex, where the gradual taking occurred that forms the basis of the inverse condemnation, or taking, of property rights to use, enjoy, and maintain the fish and game preserve. The lower court was affirmed by the court of appeal. Hence, the Preserve Commission applies to this Court for a writ of certiorari for redress.

REASONS FOR GRANTING THE PETITION

Erosion occurring above the ordinary high water mark of the Red River would have resulted in a compensable taking of property under the Fifth Amendment, regardless of the navigational servitude. *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), *Banks v. U.S.*, 2003 WL 18410 (C.A.Fed. 2003). Therefore, it seems axiomatic that the subject taking of the Black Lake Complex and the condemnation of most if not all of the use of the fish preserve, as a result of the raising of Pool 3, would also be compensable. The interest at issue relates to the property itself, which is slowly being taken as a result of an authorized government act.

The taking did not occur below the ordinary high water mark of the Red River. The damage suffered in the Black Lake Complex by the Preserve Commission is tantamount to the damage suffered in *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), *Boling v. U.S.*, 220 F.3d 1365 (C.A.Fed. 2000), *Banks v. U.S.*, 2003 WL 18410 (C.A.Fed. 2003), *United States v. Kansas City Life Ins. Co.* 339 U.S. 799 (1950), and *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979).

If a governmental project imposes permanent consequences on private property that are the direct, natural, or probable result of an authorized activity and are inevitably recurrent, then a Fifth Amendment taking has occurred. *Tri-State Materials Corp. v. U.S.*, 550 F.2d 1 (Cl.Ct. 1977), *Boling v. U.S.*, 220 F.3d 1365 (C.A.Fed. 2000).

Petitioner has and does now contend that the continuing process of physical events by which respondent permitted the taking of petitioner's lawful property interest in the fish and game preserve was grounds for allowing petitioner to file suit once the nature and extent of the taking and its effect became clear and stabilized. The Preserve Commission claim involves the taking of the property comprising Black Lake Complex, which is above the ordinary high water mark of the Red River. The evidence supports the Preserve Commission's claim, regardless of the government's attempt to redefine the real issue (i.e. a gradual taking of the lakes and preserve) into something that, conveniently, has no property right attached to it.

In the case at bar the taking claim is for loss of use and enjoyment of the lakes, property rights that were granted to the Preserve Commission under Louisiana state law. Petitioner's loss, which is a loss of property rights much like the right to exclude others in *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979), is traceable to the government's project to elevate Red River to an artificial level. These facts constitute a taking by a gradual physical process for which compensation should be provided in order for the Preserve Commission to restore the fish and game preserve and prevent the complete condemnation of the lake complex in the future. These facts do not, however, indicate a taking of property below the ordinary high water mark of the river such that the navigational servitude would preclude a claim for compensation.

Furthermore, even if the navigational servitude did apply to the facts in this case, there is no material basis for the disparate treatment of navigation as opposed to other public uses which trigger the Takings Clause of the Fifth Amendment and require compensation.

I. REVIEW IS WARRANTED TO ADDRESS THE MISAPPLICATION OF THE NAVIGATIONAL SERVITUDE TO THE FACTS OF THIS CASE

A. *The Navigational Servitude Does not Extend to the Northwest Louisiana Fish and Game Preserve*

Invocation of the federal navigational servitude cannot be a pretext to avoid an otherwise compensable taking. *Palm Beach Isles Assoc. v. U.S.*, 2003 WL 22937326 Fed.Cl.,2003. The navigational servitude does not create a blanket exception to the Takings Clause of the Fifth Amendment. *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979), *Alameda Gateway, Ltd. v. U.S.*, 45 Fed.Cl. 757 (Fed.Cl.,1999). Unlike the power to regulate navigable waters under the commerce clause, the navigational servitude is not coextensive with Congress' regulatory authority. *Boone v. U.S.*, 944 F.2d 1489 (C.A.9.Haw.,1991).

Furthermore, the servitude only encompasses the exercise of federal power with respect to the stream itself and lands beneath its ordinary high-water mark. *U.S. v. Virginia Elec. & Power Co.*, 81 S.Ct. 784 (U.S.Va.,1961), emphasis provided. However, the government must compensate for any taking of property above the ordinary high water mark. In other words,

> "Those owning land within the bed of a navigable stream are subject to the navigational servitude and may not claim compensation when the Government takes the land in aiding the navigability of the

> stream, while those beyond the ordinary high water mark are not subject to navigational servitude and may recover."

Tri-State Materials Corp. v. U.S., 550 F.2d 1 (Cl.Ct. 1977).

The specific basis for the Preserve Commission's claim in the case at bar is that the Corps inversely condemned petitioner's lake and surrounding land when it undertook improvements of the Red River in order to facilitate commercial use of the river, and failed to pay just compensation for the taking. The Preserve Commission's property is distinctly separate from Red River; in between the lake complex and the river are a tributary and a state dam since 1931.

As the Federal Circuit Court of Appeal has explained, "there must be horizontal limits to the extent of a riverbed, or else imposition of the navigational servitude up to the ordinary high-water mark theoretically could extend indefinitely." *Owen v. U.S.*, 851 F.2d at 1410 (1990). "The navigational servitude only relieves the government of the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands which, if not for the fact that a waterway is involved, would require compensation under the fifth amendment." *Boone v. U.S.*, 944 F.2d 1489, 1494 (C.A.9,1991).

Because the taking of the land and property interest in question in the case at bar is outside and/or above the ordinary high water mark of the Red, it is outside

the scope of the navigational servitude, which the Corps should not be able to rely on as a defense to petitioner's claim.

In *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), the Federal Circuit Court held that

> "[i]n appropriate circumstances, compensation can be owed for consequential effects of construction activities to further navigation, undertaken solely within the boundaries of a river bed subject to the Government's navigational servitude; it is not the location of the cause of the damage that is relevant, but the location and permanence of the effect of the government action causing the damage that is the proper focus of the taking analysis."

Emphasis provided.

In that case, the Corps of Engineers argued that it was within its authority as owner of the dominant navigational servitude to intentionally redirect the course of the Tombigbee River to undercut an adjoining landowner's property, resulting in the landowner's farm collapsing into the river due to lack of lateral support. The court of appeals held that the navigational servitude did not extend to existing fast lands. *Owen* at 1043. Because the property alleged as lost due to government-caused erosion was outside the bed of the river, it was unaffected by the navigational servitude.

Therefore, it is well established that even if the navigational improvements were within the proper boundaries, a taking occurs when the damaged property is located outside the water's ordinary high-water mark, and thus renders the government liable for the payment of just compensation. *Kingsport Horizontal Property Regime v. U.S.*, 46 Fed.Cl. (Fed.Cl.,2000).

This was the rationale of *United States v. Kansas City Life Ins. Co.* 339 U.S. 799 (1950), where the U.S. Supreme Court held that when a navigable stream was raised by the government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the government was liable "for the effects of that change [in the water level] upon private property *beyond the bed of the stream.*" 339 U.S., at 800, 801.

The Court in *Kansas City Life* allowed recovery for damages to land located on a non-navigable tributary of the Mississippi River resulting from the artificial maintenance of the Mississippi at its high-water level. The land was located one and one-half miles from the river on the tributary. The raised water level in the river also raised the local water table which blocked the drainage of the affected parcel's surface waters, thereby causing the destruction of the land's agricultural value. Since the land, not in the bed of a navigable stream, was not burdened with the navigational servitude, the Court held that a taking had occurred. *Id.* at 802-03.

Kansas City Life thus provides a clear application of the Supreme Court's view of the horizontal and vertical limits on the scope of a stream bed, and of the

corresponding scope of the navigational servitude. It is also particularly applicable to the case at bar because the government here did not establish, nor did the lower court find that the tributary from Black Lake Complex was navigable in FACT, as required by law. *U.S. v. Cress*, 243 U.S. 316 (U.S. 1917).

> "To qualify as a navigable waterway of the United States subject to federal jurisdiction under the Commerce Clause, the waterway must form, either by itself or by united with other waters, a continued highway over which commerce may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water."

Lykes Bros., Inc., v. U.S. Army Corps of Engineers, 821 F.Supp. 1457, 1464 (M.D.Fla. 1993). The navigational servitude does not cover non-navigable tributaries. *United States v. Cress*, 243 U.S. 316, 326-27, 37 S.Ct. 380, 384, 61 L.Ed. 746 (1917), *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975).

Trade or commerce is not conducted on Sabine Bayou, the tributary in question, at one end of which the Allen Dam was built shortly after the fish and game preserve was lawfully established by the State in 1926. However, even if the tributary was navigable, the navigational servitude would not then extend past the spillway into the Black Lake Complex and preserve lands.

In *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975), the landowner owned property adjacent to a stream, which flowed into a navigable river, which, in turn, flowed into another navigable river on which the government had constructed a dam. Prior to construction of the dam, the property adjoining the stream, or creek, was used by the landowner for hunting and grazing cattle. In addition, the trees growing along the banks of the creek had commercial value. After completion of the dam, however, the property bordering the creek flooded. In determining that the landowner was entitled to compensation for the permanent flowage easement, the court held that the property adjoining Goose Creek was not subject to the government's navigational servitude covering the beds of the two navigable rivers into which it flowed, because such property was situated beyond the beds of those rivers. *Goose Creek*, 518 F.2d at 583. Alternatively, the court held that "even if Goose Creek were considered to be a navigable stream, the landowner nonetheless would be entitled to compensation, since the strips of land adjacent to the creek were above the ordinary high-water mark of Goose Creek under any of the definitions stated above." *Id.* at 584.

In the case at bar, Black Lake Complex is subject to the navigation or navigational project of the Red River, and the lake and contiguous land in the Preserve Commission's possession are above the ordinary high water mark of Pool 3. Therefore, the U.S. should be subject to liability for damages caused to the property as a result of the elevation of Pool 3 to 95 MSL.

The two lower courts' reliance on *U.S. v. Willow River Power Co.*, 324 U.S. 499 (U.S. 1945), is misplaced. In that case, suit by the Willow River Power Company was brought against the United States to recover compensation for impaired efficiency of the company's hydroelectric plant caused by the raising the water level of the St. Croix River. The issue in that case was whether a taking had occurred, which the court concluded in the negative: "Our question is whether the damage is the result of a 'taking' of private property, for which just compensation is required by the Fifth Amendment." *Willow Creek* at *500. The plaintiff sought an award solely for the loss of power; there was no allegation or finding that any other injury was done to property or that the claimant otherwise was deprived of any use of its property, or the impairment of the value of land. *Id.* at 501. Under these circumstances, the court in *Willow River* determine that the plaintiff's allegation did not rise to a taking because it involved an "economic interest" that did not constitute a property right: "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *Id.* at 502.

The *Willow Creek* Court further stated,

> "We cannot . . . call such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests.

> Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation. The claimant's assertion that its interest in a power head amounts to a 'property right' is made under circumstances not present in any case before considered by this Court."

Id. at 503.

In the case at bar, the taking claim is based on injury to the use of the lakes and preserve, for which the Preserve Commission seeks compensation. The question is the impairment of and physical damage to the property itself, not an economic advantage disconnected to any property right. The Preserve Commission does not have nor has alleged any economic value for use of the Red, as in *Willow Creek*. Petitioner has always sought compensation for loss of use and enjoyment, and other property rights associated with possession of the lakes and, necessarily, the purpose for which the fish and game preserve was established so long ago.

The case at bar is more analogous to *Kaiser Aetna v. U. S.*, 444 U.S. 164 (U.S.,1979), in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, invested substantial amounts of money in making improvements. The government contended that as a result of the pond's connection to the navigable water, the private property became subject to the federal navigational servitude. The United States Supreme Court did not agree. The Court, distinguishing *Willow Creek*, stated

> "We think, however, that when the Government makes the naked assertion it does here, that assertion collides with not merely an 'economic advantage' but an 'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'"

Kaiser Aetna at 178.

Accordingly, if a plaintiff's interest involves a legally enforceable right, that interest will be considered "property" within the context of the takings clause of the Fifth Amendment. *State of Illinois v. U.S.*, 15 Cl.Ct. 399, (1988). Stated slightly differently, property within the Fifth Amendment denotes the group of rights inhering in a party's relation to the physical thing, as the right to possess and use it. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945).

The Preserve Commission's property and legally enforceable interests vest in petitioner the right to bring a taking claim against the government in order to compel compensation for the interference with said interests. Therefore, in the context of the case at bar, although the Preserve Commission does not have title to the property at issue, petitioner does have property interests protected by the takings clause of the Fifth Amendment. In fact, there is no right or interest with regard to the lakes and land comprising the fish and game preserve that the Preserve Commission does not have under Louisiana law because it has the legal duty of the Preserve Commission to protect the rights inherent in possession of the preserve.

It is the taking of many of those property rights that the Preserve Commission is undertaking its obligation to seek compensation from the government. The taking of the property rights at issue occurred above the ordinary high water mark of the Red River. Therefore, the Federal Claims Court and the Federal Circuit Court rulings that the navigational servitude precludes the Preserve Commission's claim are not supported by the evidence in the record or the relevant law.

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN TREATMENT BETWEEN NAVIGATION AND OTHER PUBLIC USES, THE TAKING OF WHICH ARE COMPENSABLE UNDER THE UNITED STATES CONSTITUTION

In an additional view, Federal Circuit Judge Randall R. Rader raises an important question regarding a conflict between the federal courts' treatment of certain public purposes which trigger the Fifth Amendment Takings Clause. The result of the conflict is that takings for public use generally require just compensation, while one purpose, i.e. navigation, does not entitle claimants to compensation as a result of a historic privilege that constitutes a dominant servitude.

While the implications of this question are broad and appear to reach as far back as the birth of this nation as we know it, the factual and legal issues in the case at bar are also implicated by the resulting conflict in the way the Constitution has been applied to seemingly analogous takings cases.

The content of the additional view reads as follows:

> RADER, Circuit Judge, additional view.
>
> While I endorse the reasoning and results of the panel, I write separately to highlight a distressing ambiguity in this court's binding precedent. Neither this court nor the Supreme Court has proffered any material basis justifying a different treatment of navigation versus other Fifth Amendment

> public purposes. Why should navigation be received any differently than highway transportation, public safety, or environmental protection? In light of the special protections afforded to navigation, it seems only prudent that such a material basis be provided. (Appendix A, 15a.)

Under the Fifth Amendment of the United States Constitution, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Const.Amend. 5.

Courts have interpreted the Fifth Amendment to mean that where a government requires land owners to suffer permanent invasion of their property, however minor, the government must provide just compensation. *Lingle v. Chevron U.S.A. Inc.*, 125 S.Ct. 2074, 544 U.S. 528, 161 L.Ed.2d 876 (2005).

The constitutional requirement of just compensation upon the taking of private property for public use derives as much content from basic equitable principles of fairness as it does from technical concepts of property law. *U. S. v. Fuller*, 93 S.Ct. 801, 409 U.S. 488, 35 L.Ed.2d 16 (1973). In other words, it is a question of due process of law. *Village of Norwood v. Baker*, 19 S.Ct. 187, 172 U.S. 269, 43 L.Ed. 443 (1898).

The Takings Clause does not allow an owner to prohibit the government from taking private property altogether; rather, the language of the clause prohibits the government from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole. *Maritrans Inc. v. U.S.*, 342 F.3d 1344 (C.A.Fed.2003). Therefore, when a public need arises that requires the acquisition of property, individuals may be required to relinquish ownership of property so long as they are given that just compensation which this clause requires. *U.S. ex rel. Tenn. Valley Authority v. Welch*, 66 S.Ct. 715, 327 U.S. 546, 90 L.Ed. 843 (1946).

For example, the government may not take or impose an easement without just compensation under the Takings Clause. *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346 (C.A.Fed.,2003). Nor may the government condemn easements under the Fifth Amendment without compensation. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (C.A.10,2002).

That being said, there is one exception to this general rule that the federal government plays like a wild card whenever navigation is involved. So the issue at hand is this: why does a jurisprudential privilege with no material basis trump a due process right guaranteed by the Fifth Amendment of the U.S. Constitution?

In *U.S. v. 30.54 Acres of Land, More or Less, Situated in Greene County, Com. of Pa.*, 90 F.3d 790 (C.A.3,1996), the court explained that although the Fifth Amendment requires payment of just compensation for private property taken for public use, the government is not required to pay for economic losses resulting from the exercise of its "navigational servitude," which is its power to regulate the use of navigable waterways, because navigable waterways have always been under

the exclusive control of the federal government under the Commerce Clause.

Therefore, the courts have held that the basis of the federal government's "dominant servitude" over the navigable waters of the United States arises from the Commerce Clause of the United States Constitution. *Parm v. Shumate*, 513 F.3d 135 (C.A.5.La.,2007), *Banks v. U.S.*, 71 Fed.Cl. 501 (Fed.Cl.,2006).

The Commerce Clause of the United States Constitution broadly refers to the regulation of commerce, and provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.C.A. Const. Art. I § 8, cl. 3.

The channels of interstate commerce which Congress may regulate under its commerce clause power are the routes through which commerce travels, and the term refers to navigable rivers, lakes, and canals, the interstate railroad track system, the interstate highway system, interstate telephone and telegraph line, air traffic routes, television and radio broadcast frequencies, and satellite communication frequencies on, over, and through which flow the goods, commodities, and information which constitute commerce between places in different states. *U.S. v. Shahani-Jahromi*, 286 F.Supp.2d 723 (E.D.Va.,2003), *U.S. v. Ballinger*, 395 F.3d 1218 (C.A.11.Ga.,2005).

On the surface, it does sound logical that a navigational servitude is the right of the public to use navigable waterways as continuous highways for the

purpose of navigation in interstate commerce as in cases like *Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824 (C.A.5,1993). However, to make such a statement raises the question of why other means of interstate commerce within the regulatory power of Congress are not also granted special protection, privilege, or dominance.

Highways, for example are within the power of Congress to regulate under the Commerce Clause. Additionally, highway transportation is also a public use covered by the Fifth Amendment. Yet the acquisition of private property for the improvement of a highway by the government is a Fifth Amendment taking that requires just compensation in order to comply with due process of law. *Federal Real Estate & Storage Co. v. U.S.*, 79 Ct.Cl. 667 (Ct.Cl.,1933), *Fruin-Colnon Corp. v. Vogt*, 500 F.Supp. 606 (S.D.Ill.,1980).

In *Farmland Preservation Ass'n v. Goldschmidt*, 611 F.2d 233 (C.A.8,1979), a federal interstate highway project through a rural area between Cedar Rapids and Waterloo bisected farm lands adapted to various agricultural uses. As a result, the contemplated highway would force the affected farmers into unfavorable diagonal operations. The court held that "[t]he landowners are entitled, of course, to just compensation for their lands that are taken in connection with the project" pursuant to the Fifth Amendment. *Goldschmidt* at 237. "And where, as here, partial takings are involved, the landowner is entitled to be compensated not only for the value of his land that is actually taken, but also for the diminution of the value of what is left to him after the taking." *Id. See also, U.S. v. Gossler*, 60 F.Supp. 971 (D.C.Or.1945), where the

government condemned a parcel of land servient to a right of way connecting a gravel bar with a highway, the owner of the right to take gravel from bar had a compensable property interest in the right of way other than the value of the way itself, and the government was not free from liability to such owner for the taking of their interest in the way.

In *U.S. v. Certain Parcels of Land in Kent County, Mich.*, 252 F.Supp. 319 (D.C.Mich. 1966), a condemnation proceeding in connection with the construction, reconstruction, and improvement of the Michigan Highway Project I-96-1(10)66, the court denied the government's motion for summary judgment. The court held that the issue as to whether the interference with the owner's property, a portion of which was condemned in connection with construction, reconstruction and improvement of a highway project, was so substantial as to be a taking, and thus compensable under the Fifth Amendment precluded summary judgment. "What is at issue here is a claim that the interference with defendant's property is so great as to render that property ineffective and useless (in effect, destroyed) for [its] purposes[.]" *Certain Parcels of Land in Kent County, Mich.* at 324, also citing *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945)

> "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has

> been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

Even a municipality, a county, a state or another public entity having responsibility for the property taken has sufficient property interest to maintain action and is entitled to compensation for the taking. *State of Wash. v. U.S.*, 214 F.2d 33 (C.A.9, 1954), *Sarpy County, Neb. v. U. S.*, 386 F.2d 453, 181 Ct.Cl. 666 (Ct.Cl.1967).

Therefore, an unacceptable conflict has arisen between the way the courts handle land owners' rights in the cases discussed above involving highways as a public use, and the way plaintiffs such as the Preserve Commission are treated. Review is warranted to resolve this conflict, since the navigational servitude is a jurisprudentially created privilege, while just compensation is a constitutional right to due process of law.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED JULY 31, 2009

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5039

NORTHWEST LOUISIANA FISH & GAME PRESERVE COMMISSION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 02-CV-1031, Judge Nancy B. Firestone.

DECIDED: July 31, 2009

Before LOURIE, RADER, and DYK, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge,* RADER. Additional View filed by *Circuit Judge,* RADER.

Appendix A

RADER, *Circuit Judge.*

The United States Court of Federal Claims dismissed the Northwest Louisiana Fish & Game Preserve Commission's Fifth Amendment taking claim based on the United States' construction and operation of a navigation project on the Red River. Because the Court of Federal Claims correctly determined that the Commission's property interest arose from access to and use of a navigable waterway, this court affirms.

I.

The Red River rises in the Texas panhandle and flows east along the Texas-Oklahoma and Texas-Arkansas borders, then south into Louisiana, eventually emptying into the Atchafalaya and Mississippi Rivers. The State of Louisiana built the Allen Dam to maintain water levels and prevent backwater flooding of the Red River. The Allen Dam created three lakes: Black Lake, Clear Lake, and Saline Lake. Black Lake and Clear Lake are connected. In fact, the local community often calls them the Black/Clear Lake. In 1926, the State of Louisiana established the Northwest Louisiana Fish & Game Preserve Commission ("Commission") to enhance wildlife and fishery habitat and recreational opportunities in the area.

The Saline Bayou tributary connects Black/Clear Lake to the Red River. Water released from Black/Clear Lake flows through Saline Bayou for ten miles before emptying into the Red River. In the past, the

Appendix A

Commission controlled fish population and aquatic vegetation growth in Black/Clear Lake by draining, or drawing down, the lake into the Red River through the Saline Bayou.

In 1968, Congress authorized the "Red River Navigational Project" with the intent of improving navigation to allow year-round navigation on the Red River. The project increased water depths along the Red River by constructing five lock and dam combinations at various points along the river. The area of the Red River between each successive lock and dam combination constitutes a pool. The locks and dams operate to insure that each pool is sufficiently deep to allow for year-round navigation.

The Saline Bayou connects Black/Clear Lake to the area of the Red River that constitutes Pool 3. Before the locks, the United States Army Corps of Engineers ("Corps") maintained Pool 3 at a depth of eighty-seven feet above mean sea level ("MSL"). Because the Saline Bayou empties into Pool 3, the water level at that point in the river directly affects the draw down potential of the Saline Bayou and hence, Black/Clear Lake.

In 1982, the Allen Dam failed. In response, the State constructed an emergency closure to prevent the total drainage of Black/Clear Lake. Following the failure, the Commission sought approval to construct a new dam. The new dam–known as the Black/Clear Lake Dam–was subject to the permit requirements of Section 404 of the Clean Water Act. 33 U.S.C. § 1344. The Corps issued

the permit, which included a clause that provided that the United States "does not assume any liability" for "damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest."

After construction of the Black/Clear Lake Dam, the Commission periodically released large amounts of water into the Red River in order to lower the water level and control the growth of unwanted aquatic vegetation. Using this procedure, the Commission maintained acceptable levels of fish and plant growth in Black/Clear Lake. The last scheduled draw down of Black/Clear Lake occurred in the fall of 1994, lowering the level of the lake by eight feet.

In early 1995, the Corps raised the level of Pool 3 to ninety-five feet MSL, eight feet MSL above its previous level. At this water level, the Commission could only lower Black/Clear Lake by a maximum of 4.5 feet, between 3.5 and 6.5 feet less than what the Commission required to prevent unwanted aquatic growth. The uncontrolled growth of aquatic weeds began to cause significant damage by early 1995.

In late 1996, the Commission requested the Corps to lower the water level of the Red River to allow for the draw down of Black/Clear Lake. The Commission contended that the new water level in Pool 3 limited its ability to control the growth of unwanted vegetation. The Corps denied the Commission's request. By early 1997, severe hydrilla and coontail infestation began to

occur, allegedly making some parts of the Lake useless for recreation.

The Commission has been seeking redress since 1997 for the alleged condemnation of the preserve as a result of the United States' construction and operation of the Red River Navigational Project. The Commission first filed a complaint in state court, which was subsequently removed to federal court and dismissed. The dismissal was appealed to the Fifth Circuit, where that court affirmed the dismissal. *Nw. La. Fish & Game Pres. Comm'n v. Red River Waterway Comm'n*, 220 F.3d 584 (5th Cir. 2000) (unpublished per curiam). The Commission next filed an administrative claim sounding in tort against the government that was eventually transferred to the United States Court of Federal Claims. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 62 Fed. CI. 760, 761 (2004).

On March 31, 2004, the government filed a Motion for Judgment on the Pleadings under *Rule* 12(b)(1) for lack of subject matter jurisdiction and/or under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The Court of Federal Claims dismissed on the basis that the claim was not filed within the Tucker Act's six-year statute of limitations. *Id.* at 768. The Commission then appealed to the Federal Circuit. This court reversed the Court of Federal Claims, holding that the statute of limitations did not begin to run until 1997, after the appearance of significant growth of aquatic weeds in Black/Clear Lake and the Corps' refusal to

lower the water level in Pool 3. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285 (Fed. Cir. 2006).

On remand, the Court of Federal Claims requested supplemental briefing on the remaining issues and on October 31, 2007, granted in part and denied in part the United States' motion to dismiss. *Nw. La. Fish & Game Preserve Comm'n v. United States*, 79 Fed. Cl. 400 (2007). The Court of Federal Claims entered judgment dismissing the claims sounding in tort. *Id.* at 406. The court also dismissed the taking claim based on the inability to control water levels and aquatic growth in Black/Clear Lake as barred by the navigational servitude. *Id.* at 411. The Court of Federal Claims declined to grant judgment on the Commission's claim that the backwater from Pool 3 and other flooding resulted in a physical invasion. *Id.* at 411-12. The court noted that if the Commission could demonstrate such a physical invasion, it may be entitled to compensation. Thus, the taking claim based on physical invasion, *e.g.*, due to backwater flooding, is still pending before the Court of Federal Claims. That court certified its judgment for interlocutory appeal under its Rule 54(b).

The Commission timely appealed to this Court. On appeal, the Commission submits that the Court of Federal Claims erred when it dismissed its taking claim as barred by the navigational servitude. The Commission does not challenge the dismissal of its claims sounding in tort.

Appendix A

II.

This Court reviews without deference the Court of Federal Claims' dismissal of a complaint for lack of jurisdiction or failure to state a claim. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1363 (Fed Cir. 2005). When considering a motion to dismiss, the trial court views well-pleaded factual allegations in the complaint as true. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

The Fifth Amendment instructs that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The taking calculus first identifies the private party's property interest; then the analysis weighs whether that property has been deprived or abridged sufficiently to qualify as "taken." *Members of Peanut Quota Holder Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005). In other words, a compensable Fifth Amendment taking requires a showing that the Government has taken a legally protected property right. *United States v. Willow River Power Co.*, 324 U.S. 499, 503 (1945). Not all property interests are legally protected property rights. "[O]nly those economic [interests] are 'rights' which have the law [in] back of them, and only when they are so recognized may courts compel others . . . to compensate for their invasion." *Id.* at 502.

The Commerce Clause confers upon Congress "a unique position" with respect to navigable waters. *United States v. R.B. Rands*, 389 U.S. 121, 122 (1967).

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States." *Id.* at 122-23 (quoting *Gilman v. City of Phil.*, 70 U.S. (3 Wall.) 713, 724-25 (1866)) (emphasis added). This power to regulate navigation confers upon the United States a "dominant servitude" on navigable waters. *Id.* at 123. As a result, conflicts of interest between riparian owners and the Government are not to be reconciled as between equals, "but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all." *Willow*, 324 U.S. at 510. An interest that "arises from access to, and use of, navigable waters" falls within the Government's dominant servitude, and any private interest is subservient to that servitude. *R.B. Rands*, 389 U.S. at 124-25.

The Government's navigational servitude is derived from the principle that all navigable waters in the United States are considered public property. *Owen v. United States*, 851 F.2d 1404, 1408 (Fed. Cir. 1998) (en banc). This court has acknowledged the extraordinary priority given to navigable waters, noting that they are under the "exclusive control of the federal government." *Id.* The physical limits of the dominant servitude include "the entire . . . stream, which includes the lands below ordinary high water mark." *United States v. Chi. Milwaukee, St. Paul, & Pac. R.R. Co.*, 312 U.S. 592, 596-97 (1941). The dominant servitude defines the limits within which Congress can work to improve navigation without creating an obligation to pay just compensation

under the Fifth Amendment. *Owen*, 851 F.2d at 1408. The Supreme Court has explained that the proper exercise of the Government's dominant servitude in these areas does not constitute

> an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

Chi. Milwaukee, 312 U.S. at 596-97. As a dominant servitude, it "can be asserted to the exclusion of any competing or conflicting one." *United States v. Twin City Power*, 350 U.S. 222, 224-25 (1956).

III.

This case arises from a conflict between the Commission's responsibility to maintain a natural preserve and the Corps' responsibility to maintain year-round navigation along the Red River. In the first instance, this court must consider whether the "property right" asserted is in fact a legally protectable property right. *Willow*, 324 U.S. at 502-03.

Whether an interest is a protectable right under the Fifth Amendment takes into consideration such things as "the navigable or non-navigable nature of the waters from which [the grievant] advantages," and "whether

the conflict is with another private riparian interest or with a public interest in navigation." *Id.* In *Willow*, a hydroelectric plant that operated under the head produced by the elevation difference between the Willow River and the St. Croix River sought compensation for impaired efficiency of its plant after the Government raised the water level of the St. Croix by three feet. The Supreme Court held that the Willow River Power Company (Willow Power) did not have a legally protected right in the level of the St. Croix River as a run-off for tail waters of its hydroelectric power plant. *Id.* at 509-11.

The Court reasoned that because the Willow River was a navigable river and the conflict did not arise between private riparian interests but between a private riparian owner and the public interests within the navigational servitude, Willow Power's interest in the level of the St. Croix River was subservient to the Government's dominant servitude. *Id.* at 509-10. Willow Power's interest "constituted a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation." *Id.* at 509. Although both the Government and Willow Power had interests in the water level of the St. Croix, these interests were not to be "reconciled as between equals, but the private interest must give way to a superior right." *Id.* at 510. The Government had not taken a legally protected property right from Willow Power and thus was not

required to pay compensation because Willow Power's interest arose from access to a navigable waterway. *Id.* at 511.

On appeal, Appellants argue that their property interest does not fall within the Government's servitude for two principle reasons: (1) Saline Bayou is not a navigable waterway and (2) Black/Clear Lake is simply outside of the navigational servitude.

First, regardless of the navigability of the Saline Bayou, the Red River *is* a navigable waterway. The ability to draw down Black/Clear Lake depends on the water levels of not only the Saline Bayou, but also of the Red River. In this case, the water level of Pool 3 was originally at eighty-seven feet MSL. In early 1995, it was raised to ninety-five feet MSL, an increase of eight feet MSL.

As was the case in *Willow,* the Commission's property interest in draining water into the Red River depends on "access to, and use of, navigable waters." *Willow,* 324 U.S. at 503. Thus, the Court of Federal Claims correctly concluded:

> to the extent the [appellant] bases its takings claim on the ability to drain from Black/Clear Lake into the Red River, which requires the elevation of the Red River to be below a certain level, the plaintiff's property interest is subservient to the navigational servitude.

Nw. La. Fish & Game Pres. Comm'n v. United States, 79 Fed. Cl. 400, 411 (2007). Because the Commission's interest is subservient to the Government's dominant servitude, it is not compensable under the Fifth Amendment.

Turning to the Appellant's second argument, the Government's navigational servitude does not create a blanket exception to Fifth Amendment takings. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (considering whether there was a physical invasion). The servitude encompasses the power to regulate the stream itself and the lands beneath the ordinary high-water mark ("OHWM"). The Government must compensate for any taking of property above the OHWM. *See, e.g., Baskett v. United States*, 8 Cl. Ct. 201, 209 (1985); *Tri-State Materials Corp. v. United States*, 550 F.2d 1, 5 (Ct. Cl. 1977); *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 583 (Ct. Cl. 1975). The Appellants submit that Black/Clear Lake falls well outside the physical OHWM of the Red River and that, even if the Government's actions were within the OHWM, the effects spread outside of the OHWM and amount to a compensable taking.

This court has recognized that Government action with effects outside the OHWM may amount to a compensable taking. *See Owen*, 851 F.2d at 1418. In *Owen*, the Corps dredged and widened portions of the Tombigbee River. *Id.* at 1406-07. The dredging caused an increase in water speed and drastically increased erosion of the river bank. The erosion eventually

undermined the land owner's property and caused her house to collapse into the river. *Id.* In weighing Owen's property interest against the Government's interest in controlling navigable waters, this court concluded that a compensable taking had occurred, even though the water had not been raised above its OHWM and was therefore technically within the government's dominant servitude:

> [T]he allegedly taken property was the native soil and rock which, although below the high-water mark, supported the fast land and house located beyond the high-water mark . . . . There must also be horizontal limits to the "bed" of a river; otherwise, the navigational servitude would extend infinitely in all directions and swallow up any claim for "just compensation" under the Fifth Amendment for damages occurring anywhere below the elevation of the high-water mark.

Id. at 1410. This case, however, does not present a situation analogous to *Owen*.

Here, the Commission's property interest–the ability to draw down the Black/Clear Lake in order to control unwanted aquatic weed growth–arises from access to, and use of navigable waters. *See, e.g., Willow*, 324 U.S. at 503. As such, the Court of Federal Claims properly found that the Commission's economic value in the property arose from access to and use of a navigable waterway. Thus, the navigational servitude bars the Commission's taking claim.

Appendix A

IV.

To the extent that the Commission asserts a taking of its ability to draw down Black/Clear Lake in order to control unwanted aquatic weed growth, that interest is subservient to the Government's navigational servitude. Because the Court of Federal Claims properly dismissed the Commission's claim as barred by the navigational servitude, this court affirms.

AFFIRMED

Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5039

NORTHWEST LOUISIANA FISH & GAME PRESERVE COMMISSION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant Appellee.

Appeal from the United States Court of Federal Claims in case no. 02-CV-1031, Judge Nancy B. Firestone.

RADER, *Circuit Judge*, additional view.

While I endorse the reasoning and results of the panel, I write separately to highlight a distressing ambiguity in this court's binding precedent. Neither this court nor the Supreme Court has proffered any material basis justifying a different treatment of navigation versus other Fifth Amendment public purposes. Why should navigation be received any differently than highway transportation, public safety, or environmental protection? In light of the special protections afforded to navigation, it seems only prudent that such a material basis be provided.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED OCTOBER 31, 2007

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 02-1031L
(Filed: October 31, 2007)

NORTHWEST LOUISIANA FISH & GAME PRESERVE COMMISSION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Motion for Judgment on the Pleadings; RCFC 12(c); No Jurisdiction Over Claims Sounding in Tort; Fifth Amendment Takings Claim; Standing; Navigational Servitude.

OPINION

FIRESTONE, *Judge.*

This case comes before the court on the defendant's motion, pursuant to Rule 12(c) of the Rules of the United States Court of Federal Claims ("RCFC"), for judgment on the pleadings. The defendant, the United States

("defendant" or "government"), contends that the claim filed by the plaintiff, Northwest Louisiana Fish and Game Preserve Commission ("Commission" or "plaintiff"), seeking damages from the government for an alleged taking of its ability to manage the Northwest Louisiana Game and Fish Preserve, should be dismissed under RCFC 12(b)(1) because the court lacks subject matter jurisdiction to hear the plaintiff's claim, and alternatively should be dismissed under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.[1] The plaintiff seeks approximately $26 million to cover the cost of curative measures the plaintiff asserts were made necessary by damage to its property resulting from the Red River Navigation Project, which was authorized by the government in 1968 to improve

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1. The government's motion was originally filed on March 31, 2004. As discussed *infra*, in its motion, the government also argued that the plaintiff's complaint should be dismissed under RCFC 12(b)(1) because it was barred by the applicable statute of limitations. On October 29, 2004, this court granted the government's motion and dismissed the plaintiff's complaint on the grounds that the action was barred by the statute of limitations. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 62 Fed.Cl. 760 (2004). Because the court held that the plaintiff's claim was time-barred, it did not reach any of the government's other arguments. On May 2, 2006, the United States Court of Appeals for the Federal Circuit reversed and remanded this decision, finding that the alleged taking accrued in 1997 and thus that the plaintiff's claim was not time-barred. *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1290 (Fed. Cir. 2006). The court now considers the remaining arguments presented in the government's motion for judgment on the pleadings.

the navigability of the Red River. For the reasons set forth below, the government's motion for judgment on the pleadings is **GRANTED-IN-PART** and **DENIED-IN-PART.**

BACKGROUND

The background facts of this case were set forth in significant detail in this court's prior decision, *Northwest Louisiana Fish & Game Preserve Commission v. United States,* 62 Fed.Cl. 760, 761-63 (2004), and in the Federal Circuit's decision, *Northwest Louisiana Fish & Game Preserve Commission v. United States,* 446 F.3d 1285, 1286-89 (Fed. Cir. 2006). The specific facts relevant to this decision, taken from the plaintiff's complaint and from additional exhibits filed by both parties with their respective briefs, are set forth below.

I. History of the Northwest Louisiana Game and Fish Preserve

The Northwest Louisiana Game and Fish Preserve ("Preserve") was established by the Louisiana Legislature in 1926 and was initially placed under the control of the Louisiana Conservation Commission. Act 191 of 1926. The Preserve was initially comprised of three artificially created lakes, Black Lake, Clear Lake, and Saline Lake, and the surrounding lands, and was developed for recreation and for the preservation of wildlife and fisheries. *Id.* After the creation of the Preserve, the state constructed a dam, known as the Allen Dam, to keep water from draining from the lakes.

Appendix B

In 1928, the Preserve was placed under the control of the Louisiana Department of Conservation. Act 69 of 1928. In 1946, the Louisiana Legislature created the Northwest Louisiana Game and Fish Preserve Commission[2] and granted it the authority to "administer the [Preserve] and make rules and regulations for the control thereof." Act 120 of 1946. While the Commission was originally placed under the supervision of the Department of Wild Life and Fisheries, the Commission was vested with the "right, power and authority to sue and be sued as a subdivision of the State" and to "purchase, lease or expropriate all property necessary to the erection and maintenance of the [Preserve]." *Id.* The state of Louisiana retained title to the lakes themselves, as well as the land surrounding and under the lakes. In 1976, the Legislature withdrew control over Saline Lake from the Commission and placed the Commission under the control of the Louisiana Wildlife and Fisheries Commission. Act 105 of 1976.

In 1982, the Allen Dam failed. Compl. at ¶ 15. To prevent complete drainage of Black Lake and Clear Lake ("Black/Clear Lake"), the Louisiana Department of Transportation and Development constructed a new control structure, known as the Black/Clear Lake Dam ("Dam"). Construction of this structure was completed

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2. While all relevant state legislation refers to the Commission as the "Northwest Louisiana Game and Fish Preserve Commission," the plaintiff refers to itself as the "Northwest Louisiana Fish and Game Preserve Commission." For the purposes of this opinion, the court will use the name that was used by the plaintiff when filing its complaint.

in 1990. The Dam was intended to hold the water surface elevation of Black/Clear Lake at 99.5 feet Mean Sea Level ("M.S.L."). The Dam consists of a 2,380-foot long earthen-fill embankment at an elevation of 116.0 feet M.S.L., and a concrete spillway consisting of a 350-foot long uncontrolled concrete weir with a crest elevation of 99.5 feet M.S.L. and four sluice gates. The sluice gates were designed to allow water to be released below 99.5 feet M.S.L. from Black/Clear Lake into the Saline Bayou, which connects Black/Clear Lake to the Red River. In order to lower the elevation of Black/Clear Lake below 95.0 feet M.S.L., the elevations of the Saline Bayou and the Red River were required to be lower than the Ordinary High Water Mark ("OHWM") of 96.1 feet M.S.L.

After construction of the Dam, water was periodically released from Black/Clear Lake through the sluice gates into the Saline Bayou to lower the water level of Black/Clear Lake, which prevented the growth of unwanted aquatic vegetation in Black/Clear Lake. Virginia Van Sickle, of the State of Louisiana Department of Wildlife and Fisheries, wrote in a letter to the Louisiana Department of Transportation and Development that "[d]rawdowns on Black Lake average one per every three years, with certain years having successive mid-June to mid-January and Labor Day to mid-January drawdowns to control various types of nuisance aquatic growth." Letter from Van Sickle to Patterson, October 14, 1988. Black/Clear Lake was most recently drawn down in the fall of 1994, when the level of the lake was lowered by eight feet. Pl.'s Ex. B at 1.

Appendix B

II. The Red River Navigation Project

In 1968, Congress authorized the Red River Navigation Project ("Project") with the intent of improving navigation along the Red River. River and Harbor Act of 1968, Pub.L. No. 90-483, § 101, 82 Stat. 731 (1968). Shortly thereafter, the United States Army, Corps of Engineers ("COE"), entered into an agreement with the Red River Waterway Commission ("RRWC") to begin construction on the Project with the goal of improving the navigability of the Red River. The Project provided for the construction of a nine-foot by 200-foot navigation channel, to extend approximately 236 miles from the junction of the Red River with the Mississippi River, to Old River, and upriver to Shreveport, Louisiana. The Project aimed to increase water depths along the Red River with the construction of five locks and dams at various points along the river to maintain pools at specific elevations. The OHWM of the Red River at St. Maurice (where the Red River and the Saline Bayou meet) is 96.1 feet M.S.L.

The dispute in this case involves Lock and Dam 3 ("L & D 3") and its adjacent pool, Pool 3. L & D 3 is located sixteen miles upstream from Boyce, Louisiana, and Pool 3 extends 52.3 miles upriver, from L & D 3 to Lock and Dam 4. Black/Clear Lake connects to the Red River through the Saline Bayou at Pool 3. The plans for L & D 3 were approved in April 1984. Construction of L & D 3 began on April 20, 1988 and was completed on March 12, 1993. Compl. at ¶ 11. Pool 3 had an initial elevation of 85.5 feet M.S.L. on December 9, 1991; over

the next three years, the elevation was gradually increased to 94.5 feet M.S.L., which was reached on December 9, 1994.[3]

Once construction of Pool 3 was complete, Black/Clear Lake could only be lowered by a maximum of 4.5 feet, which the plaintiff contends is not sufficient to allow it to prevent unwanted aquatic growth. Pl.'s Ex. B at 1. The plaintiff contends that the increase in the elevation of Pool 3 has limited the plaintiff's ability to control the growth of unwanted vegetation in Black/Clear Lake, because the plaintiff can no longer utilize the Black/Clear Lake Dam to drain Black/Clear Lake to a level sufficient to manage aquatic growth. In particular, the plaintiff argues that the increased growth of hydrilla and coontail, types of aquatic weeds, has rendered the northern portion of Black/Clear Lake useless.[4] The plaintiff also asserts that, because of its inability to control weed growth, portions of Black/Clear Lake are now inaccessible by boat, and the plaintiff's ability to

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3. The elevation of Pool 3 eventually leveled out at approximately 95.0 feet M.S.L. in or about January 1995.

4. Black/Clear Lake was surveyed in October 2003 for the presence of aquatic plants. The results of the survey indicated that the northwest portion of the Lake was severely infested with two species of vegetation: *Cabomba caroliniana* and *Hydrilla verticillata.* Pl.'s Ex. Q at 3. The biologist who completed the survey recommended that the area of the Lake between four feet and eight feet (which can no longer be treated by drawing down the Lake) be treated during a drawdown with herbicides. *Id.* It is not clear whether the Lake has ever been treated with herbicides.

manage fish populations has been impaired as a result. Finally, the plaintiff asserts that, due to the Project, there has been an increase in "undesirable water levels," Compl. at ¶ 19, and that Black/Clear Lake and the land surrounding the lake has experienced more frequent flooding, which in its briefs the plaintiff contends stems at least in part from the "backwater effect" from Pool 3.

III. Present Litigation

In February 1997, the plaintiff filed suit in the Tenth Judicial District Court of Natchitoches Parish, Louisiana against the RRWC, alleging that the RRWC's decision to raise the water level in Pool 3 constituted inverse condemnation under the Louisiana Constitution. The RRWC impleaded the COE as a third party defendant. The case was then removed to the United States District Court for the Western District of Louisiana, which granted the RRWC's motion for summary judgment on July 28, 1999. *Nw. La. Fish & Game Pres. Comm'n v. Red River Waterway Comm'n*, No. 97-1984, slip op. at 9 (W.D.La. July 28, 1999). The plaintiff's claims against the government under the Federal Tort Claims Act were subsequently dismissed as barred by the statute of limitations under 28 U.S.C. § 2401(b). *Nw. La. Fish & Game Pres. Comm'n v. United States*, No. 01-1264, Report and Recommendation at 11 (Apr. 1, 2002). The Western District ordered that any claim the plaintiff might have under the Tucker Act, 28 U.S.C. § 1491, be transferred to this court. *Nw. La. Fish & Game Pres. Comm'n v. United States*, No. 01-1264, slip op. at 1 (W.D. La. June 11, 2002). On August 22, 2002, this court received the plaintiff's case.

Appendix B

The government first filed a motion for judgment on the pleadings on March 31, 2004, arguing, in addition to the contentions currently before the court, that the plaintiff's claim should be barred by the statute of limitations. On October 29, 2004, the court granted the government's motion, holding that the plaintiff's claim accrued no later than December 1994, when the level of Pool 3 reached its maximum height, and accordingly that the claim was time-barred. *Nw. La. Fish & Game Pres. Comm'n*, 62 Fed.Cl. 760. The plaintiff appealed the decision, and it was reversed by the Federal Circuit on May 2, 2006. *Nw. La. Fish & Game Pres. Comm'n*, 446 F.3d 1285. The Federal Circuit determined that the accrual date of the plaintiff's claim was no earlier than January 1997, the month in which the plaintiff's request that Pool 3 be lowered so that it could drain Black/Clear Lake was denied by the COE. *Id.* at 1292. The court found that the harm suffered by the plaintiff (uncontrolled hydrilla growth) was not fixed until a substantial time after the water level in Pool 3 reached its maximum height, and therefore that the damages potentially suffered by the plaintiff were not quantifiable until the hydrilla had grown to harmful levels. *Id.* at 1291.

Subsequently, this court established a supplemental briefing schedule to address the remaining issues in the case. Each party filed its initial supplemental brief in April 2007. The court has determined that oral argument is not necessary.

Appendix B

DISCUSSION

I. Standard of Review

This matter comes before the court on the government's motion for judgment on the pleadings pursuant to RCFC 12(c), which states that "[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." "The legal standard applied to evaluate a motion for judgment on the pleadings is the same as that for a motion to dismiss." *Peterson v. United States*, 68 Fed.Cl. 773, 776 (2005).

The government first contends that dismissal is required under RCFC 12(b)(1) because this court is without jurisdiction to hear the present dispute. Specifically, the government argues that the plaintiff has failed to identify any property interest that was taken by the government and that the plaintiff's claims sound in tort, and accordingly that the plaintiff does not have standing to bring a claim against the government. In considering a motion challenging jurisdiction, the court construes allegations in the complaint most favorably to the plaintiff, resolving ambiguities in its favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court may look beyond the pleadings and "inquire into jurisdictional facts" to determine whether jurisdiction exists. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). RCFC 12(c) provides that if "matters outside the pleadings are presented to and not excluded by the court, the motion shall treated as one for summary

judgment." In most circumstances this provision "does not apply to a motion made under Rule 12(b)(1) to dismiss for lack of jurisdiction over the subject matter, which may not be converted into a motion for summary judgment even though the court in considering it may address matters outside the pleadings." *Reed Island-MLC, Inc. v. United States*, 67 Fed.Cl. 27, 32 (2005) (citing *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1383 (Fed. Cir. 2002)). However, a motion to dismiss for lack of subject matter jurisdiction *may* be converted into a motion for summary judgment "when the jurisdictional question is inextricably intertwined with the merits of the case." *Thoen v. United States*, 765 F.2d 1110, 1114 (Fed. Cir. 1985).

In the present case, the court has been presented with matters outside the pleadings, namely documents offered by the plaintiff and the government in the appendices to their respective briefs. All of these documents are public records, including correspondence to or from various state agencies and the COE, information gathered throughout the Red River Navigation Project, and reports completed on behalf of state agencies. The court will rely on these matters to the extent that they allow the court to determine whether it has jurisdiction over this case.

In the alternative, the government contends that the plaintiff has failed to state a claim upon which relief could be granted as required by RCFC 12(b)(6). When evaluating a motion for judgment on the pleadings that relies on the standards set forth in RCFC 12(b)(6), if

"matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." RCFC 12(c). As discussed above, the court has been presented with matters outside of the pleadings by both parties. Accordingly, the government's challenge of the plaintiff's claims on RCFC 12(b)(6) grounds will be treated as a motion for summary judgment.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In considering a motion for summary judgment, the court's role is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact; once this burden is met, in order to defeat summary judgment, the non-moving party must present evidence which demonstrates such a genuine issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1243-44 (Fed. Cir. 2007). In determining whether a genuine issue of material fact exists, the court must consider the evidence and resolve all doubts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith*

Radio Corp., 475 U.S. 574, 587-88 (1986); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004).

II. The Court Does Not Have Jurisdiction over the Plaintiff's Claims Sounding in Tort.

The government contends that this court lacks jurisdiction over the plaintiff's claims because the claims sound in tort and do not merit treatment under takings law. The government asserts that the plaintiff has not alleged any physical invasion of its property by the government, which the government argues is a required element of a takings claim. Specifically, the government argues that the plaintiff's complaint contains numerous allegations of tortious conduct, including trespass and nuisance, and that the complaint fails to identify any compensable property interest that was physically invaded or taken as a result of the government's actions.

The Court of Federal Claims is a court of limited jurisdiction, *Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (citing *United States v. King*, 395 U.S. 1, 3 (1969)), and under the Tucker Act, 28 U.S.C. § 1491 (2000), may "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). It is well-settled, however, that the Tucker Act's jurisdictional grant does not extend to cases

sounding in tort. *See Id. See also Keene Corp. v. United States,* 508 U.S. 200, 214 (1993); *Jentoft,* 450 F.3d at 1349-50; *Edelmann v. United States,* 76 Fed.Cl. 376, 380 (2007).

In its amended complaint, the plaintiff alleges that the government's actions at issue in this case constitute a "continuing trespass and/or continuing nuisance." Compl. at ¶ 19. The plaintiff also asserts that the government committed "improper and unlawful acts" which resulted in losses to the plaintiff, including the "loss of use of lands and waters involved, diminution in market value of said lands and/or waters, an interference with or destruction of the use of said lands for wildlife habitat and other recreational purposes, together with other specials [sic] or consequential damages including costly curative work necessitated thereby." Compl. at ¶ 20. Finally, the plaintiff asserts that the actions of the government constitute a "continuing tort." Compl. at ¶ 27.

This court has no jurisdiction over the plaintiff's claims regarding a continuing trespass or continuing nuisance. These claims sound in tort, and tort claims are expressly excluded from this court's jurisdiction under the Tucker Act. 28 U.S.C. § 1491(a)(1). In addition, the plaintiff's contentions that the government's action in constructing Pool 3 was "improper and unlawful" are allegations that the government's conduct was tortious and such contentions are not proper in the context of a takings claim. "[I]n a takings case we assume that the underlying governmental action was lawful, and we decide only whether the governmental action in question

constituted a taking for which compensation must be paid." *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001). The Federal Circuit also held that "to the extent the plaintiff claims it is entitled to prevail *because* the agency acted in violation of statute or regulation . . . [the plaintiff does not have] a right to litigate that issue in a takings action." *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (emphasis in original). Because this court does not have jurisdiction over the plaintiff's claims sounding in tort, the tort claims included in Counts 19, 20, and 27 of the plaintiff's amended complaint, and any other allegations sounding in tort included in the plaintiff's amended complaint or pleadings, must be dismissed.

III. The Plaintiff Has Standing to Maintain a Takings Claim.

The government contends that any remaining takings claim should be dismissed pursuant to RCFC 12(b)(1) because the plaintiff lacks standing to bring this suit. Specifically, the government alleges that the plaintiff has not identified a property interest of which it is the owner that was "taken" by the government as required by RCFC 9(h)(7), which requires that a plaintiff bringing a takings claim identify, in the pleadings, "the specific property interest that plaintiff contends has been taken by the United States." The government asserts that it is well-settled that only the owner of the property on the date of a taking may bring a takings claim in this court. *See, e.g., Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992). The government argues

that the plaintiff does not hold title to any of the lands comprising the Preserve,[5] including the bed and bottom of Black/Clear Lake and the lake itself, asserting that the state of Louisiana holds the title to Black/Clear Lake and the lands contiguous to the lake. Furthermore, the government argues that, to the extent the plaintiff seeks compensation for the taking of its ability to manage the Preserve, such an ability does not constitute a property right for the purposes of the Fifth Amendment. Accordingly, the government contends that the plaintiff's claim should be dismissed for lack of subject matter jurisdiction.

The plaintiff concedes that it does not hold title to any of the property at issue. However, the plaintiff argues that, as an agency or subdivision of the state of Louisiana, it effectively functions as an "alter ego" of the state. In addition, the plaintiff contends that it has been vested with the power to "sue and be sued" as a subdivision of the state, Act 308 of 1948, and that the Preserve operates under the plaintiff's administration and control. The plaintiff argues that its property interest stems from the legal right of enforcement and adjudication of issues related to the Preserve, and that whether the plaintiff holds title to the physical property comprising the Preserve is irrelevant.[6] Relying on

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5. According to Act 69 of 1928, the lands comprising the Preserve include "all of the land lying within one quarter of a mile on the edge of the water at high water mark in said lakes."

6. The plaintiff does contend, however, that because it functions as a subdivision of the state, "there is no need for a (Cont'd)

Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979), the plaintiff asserts that an interest involving a legally enforceable right is considered a property interest within the meaning of the takings clause, and that its legally enforceable right to manage the Preserve has been taken by the government.

Specifically, the plaintiff contends that this court has determined that state entities charged with the maintenance of state property have a sufficient property interest to bring a takings claim against the government. In *County of Sarpy, Nebraska v. United States*, 181 Ct.Cl. 666, 386 F.2d 453 (1967), the court determined that the plaintiff, a county, was entitled to compensation for the closing of a portion of a county road, holding that "the appropriate governmental unit, such as a county, having the responsibility of constructing, maintaining, or preserving highways, has a sufficient property interest to maintain an action when one of its highways is taken." *Id.* at 457. The plaintiff argues that, similarly in this case, because the plaintiff has the statutory right to enforce and adjudicate matters pertaining to Black/Clear Lake, it has a sufficient property interest in Black/Clear Lake to maintain a takings claim.

The Court of Federal Claims has jurisdiction, under the Tucker Act, to hear claims for money damages

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subdivision of the state to be named on a title to property which is owned by the state." Pl.'s Supp. Br. at 16 fn. 1. Therefore, the plaintiff argues that ownership of the property comprising the Preserve should not be an issue in this case.

against the United States. However, the Tucker Act simply confers jurisdiction on this court; a plaintiff must also identify a separate money-mandating statute upon which to base a claim for damages. *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004); *Tippett v. United States*, 185 F.3d 1250, 1254 (Fed. Cir. 1999) ("[T]he plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States." (quoting *James v. Caldera*, 159 F.3d 573, 580 (Fed.Cir. 1998))). In determining jurisdiction, this court must ask "only whether the plaintiff is within the class of plaintiffs entitled to recover under the statute if the elements of a cause of action are established." *Greenlee County v. United States*, 487 F.3d 871, 876 (Fed. Cir. 2007). *See also Brodowy v. United States*, 482 F.3d 1370, 1375 (Fed. Cir. 2007) ("Where plaintiffs have invoked a money-mandating statute and have made a non-frivolous assertion that they are entitled to relief under the statute, we have held that the Court of Federal Claims has subject-matter jurisdiction over the case.").[7] Here,

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7. The Supreme Court recently opined as to the requirements of a pleading:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than just labels and conclusions, and a formulaic recitation of a cause of action's elements

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the plaintiff has invoked a money-mandating Constitutional provision, the Fifth Amendment, and has made a non-frivolous assertion that it is entitled to relief under the Fifth Amendment. The plaintiff has identified a property interest in managing Black/Clear Lake on behalf of the state. The plaintiff fits within the criteria for ownership adopted by the Court of Claims in *County of Sarpy*. Like the County in that case, the plaintiff in this case is charged with the maintenance of property, the Preserve, for which the state holds title. Accordingly, this court has subject matter jurisdiction over the plaintiff's takings claims.

IV. Portions of the Plaintiff's Alleged Property Interest Are Subservient to the Navigational Servitude.

Under the Fifth Amendment, private property cannot "be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has held that a taking can fall into one of two categories: a physical taking or a regulatory taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992). In this case, the plaintiff alleges a physical taking, which is a "permanent physical occupation authorized

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> will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1959 (2007).

by the government." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). "Where the government authorizes a physical occupation of property (or actually takes title) the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). In order to successfully bring a takings claim, a plaintiff must first identify the property interest allegedly taken. If a property interest exists for the purposes of the Fifth Amendment, the court must then determine whether a taking actually occurred. *Members of Peanut Quota Holders Ass'n. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005). "In a physical takings case, the inquiry is limited to whether the claimant can establish a physical occupation of his property by the Government." *Applegate v. United States*, 35 Fed.Cl. 406, 414 (1996). Where, as here, the taking involves a project aimed at improving navigation, additional issues are raised. In particular, the court must first consider the impact of the navigational servitude on the property interest at issue.

The government contends that any compensation sought by the plaintiff for the alleged taking of the plaintiff's ability to manage Black/Clear Lake is barred by the navigational servitude.[8] The navigational

8. In its April 6, 2007 Supplemental Brief, the plaintiff argued for the first time that the government waived the ability to raise the navigational servitude as a defense because it was not affirmatively pled in the government's Answer. Pl.'s Supp. Br. at 40. The plaintiff asserts that, pursuant to RCFC 8(c), (Cont'd)

servitude doctrine is a long-standing concept derived from the principle that all navigable waters in the United States are considered "public property" and are under the "exclusive control of the federal government." *Owen v. United States*, 851 F.2d 1404, 1408 (Fed. Cir. 1988) (en banc). The Supreme Court has established that the power granted to the United States under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, includes

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failure to plead an affirmative defense constitutes a waiver of that defense. The government argues that, assuming that the navigational servitude is considered to be an affirmative defense, it did not waive the ability to raise the navigational servitude in response to the plaintiff's claims because a waiver "is not effective absent unfair surprise or prejudice." *First Annapolis Bancorp, Inc. v. United States*, 75 Fed.Cl. 280, 288 (2007). The government contends that, because it first raised the navigational servitude in its original Motion for Judgment on the Pleadings, filed three years ago, and because the plaintiff responded to the navigational servitude argument in its initial opposition brief, the plaintiff has not been unfairly surprised or prejudiced by the government's arguments invoking the navigational servitude. The government is correct. The plaintiff has had sufficient time to respond to the government's arguments regarding the navigational servitude, and has responded in a complete and detailed manner. *See* Pl.'s Opp. to Def.'s Mot. at 36-38; Pl.'s Supp. Br. at 36-40. An affirmative defense that is not pled as prescribed is not waived absent unfair surprise or prejudice. *See Caldera v. Northrop Worldwide Aircraft Servs., Inc.*, 192 F.3d 962, 970 (Fed. Cir. 1999) (discussing Fed.R.Civ.P. 8(c), which is identical to RCFC 8(c)); *First Annapolis Bancorp*, 75 Fed.Cl. at 288. Accordingly, the government's invocation of the navigational servitude in its Motion for Judgment on the Pleadings is allowed.

the ability to regulate navigation, and that that ability is dominant to any other property interest existing in a navigable body of water and the bed of that body of water below the OHWM. As the Court has explained:

> This power to regulate navigation confers upon the United States a "dominant servitude," which extends to the entire stream and the stream bed below the ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. *United States v. Chicago, M., St. P. & P.R. Co.*, 312 U.S. 592, 596-97 (1941).

United States v. Rands, 389 U.S. 121, 123 (1967) (some citations omitted). Based on this precedent, the Federal Circuit has held that "upon the determination of Congress to improve navigation, the navigational servitude defines the appropriate boundaries within which the United States can assert its power to supersede private ownership interests without creating an obligation to pay just compensation under the Eminent Domain Clause of the Fifth Amendment." *Owen*, 851 F.2d at 1408. However, no court has held that "the navigational servitude creates a blanket exception

to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). For example, "the government may be liable for a taking when its activities to improve navigation 'result in erosion to land above or outside' of the navigational servitude." *Banks v. United States*, 68 Fed.Cl. 524, 532 (2005) (quoting *Owen*, 851 F.2d at 1412). Similarly, the government can be held liable for the flooding of fast lands located beyond the beds of navigable rivers. *See, e.g., Baskett v. United States*, 8 Cl.Ct. 201, 209 (Ct.Cl.1985); *Tri-State Materials Corp. v. United States*, 213 Ct.Cl. 1, 550 F.2d 1, 5 (1977); *Goose Creek Hunting Club, Inc. v. United States*, 207 Ct.Cl. 323, 518 F.2d 579, 583 (1975).

The government first asserts that the Red River Navigation Project, and in particular the raising of the level of Pool 3 to 95.0 feet M.S.L., was undertaken with the goal of improving the navigability of the Red River. The government characterizes the plaintiff's alleged loss as a loss of the ability to make releases from Black/Clear Lake into the Saline Bayou, and ultimately the Red River, and argues that the plaintiff has no compensable property interest in the flow of the Red River or the Saline Bayou, nor in any ability dependent on that flow.

The government, relying on numerous federal court decisions, contends that, while the navigational servitude extends only to the navigable stream and stream bed below the OHWM, *it also precludes any*

claim for compensation based on the loss of an ability to utilize a navigable stream below the OHWM. The Supreme Court articulated this concept in *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), in which the Court rejected a claim for compensation from a power company for the alleged taking of the ability to produce power. The Court held that, while the plaintiff had an "economic interest" in the flow of the river, that economic interest could not be considered a "property right" for the purposes of the Fifth Amendment. The Court found that a plaintiff could be compensated for the taking of an "economic interest" only if that interest was legally protected, stating:

> It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. . . . Such economic uses are rights only when they are legally protected interests. *Whether they are such interests may depend* on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; *on the navigable or non-navigable nature of the waters from which he advantages;* on the substance of the enjoyment thereof for which

> he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; *and on whether the conflict is with another private riparian interest or with a public interest in navigation.*

Id. at 502-03 (emphasis added). *See also Rands*, 389 U.S. at 124-25 (holding that the government was not required to compensate property owners for lost value of land that was used as a port site); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) ("[T]he landowner here seeks a value in the flow of the stream, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses."); *Borough of Ford City v. United States*, 345 F.2d 645, 653 (3rd Cir. 1965) (denying the plaintiff's claim for compensation for the inability to utilize gravity flow sewer system after construction of lock and dam in a navigable river), *cert. denied*, 382 U.S. 902 (1965); *City of Eufaula v. United States*, 313 F.2d 745, 747 (5th Cir. 1963) (holding that cities were not entitled to compensation for being prohibited from dumping raw sewage into a river); *City of Demopolis v. United States*, 167 Ct.Cl. 94, 334 F.2d 657, 659 (1964) (holding that the plaintiff was not entitled to compensation for the construction of a sewage treatment plant for a lake made necessary by the construction of a dam in a navigable river). Here, the government argues that the plaintiff's property interest is dependent on the level of the Red River and the use of the Red River to draw down Black/Clear Lake, and accordingly that

this interest is subservient to the government's interest in improving navigation and the plaintiff's claim based on that interest must be dismissed.

The plaintiff contends that the navigational servitude does not bar its claim because the navigational servitude does not extend to the Preserve. Specifically, the plaintiff argues that the navigational servitude does not extend to any land or property outside of the riverbed itself, and accordingly that the plaintiff is entitled to compensation related to damage to Black/Clear Lake and the surrounding lands. The plaintiff relies on *Cooper v. Louisiana Department of Public Works*, 03-1074, 870 So.2d 315 (La.App. 3 Cir. 3/3/04); in which landowners of property along a creek filed suit against the government for flooding resulting from the raising of the level of a navigational pool by nearly thirteen feet. The Louisiana Court of Appeal determined that the creeks along which the plaintiffs' property was situated were not navigable and were thus not subject to the navigational servitude. *Id.* at 334. The plaintiff contends that, similarly, because Black/Clear Lake is not navigable, its property interest in maintaining the Lake should not be subject to the navigational servitude. The plaintiff also relies on *Tri-State Materials*, 213 Ct.Cl. 1, 550 F.2d 1, which involved a claim for damages that resulted from the hindrance of natural drainage from fast lands owned by the plaintiff. The Court of Claims determined that the plaintiff's mine, which was located outside the bed of a navigable river, was damaged by subflooding due to a raised water level in the river. *Id.* at 5, 550 F.2d 1. The court accordingly determined

that the navigational servitude could not be applied by the government, and awarded the plaintiff damages for the flooding of its property. The plaintiff argues that, because its property was damaged due to the hindrance of its ability to overflow into the Red River, it should similarly be awarded damages for the flooding of its property.

Furthermore, the plaintiff makes a number of allegations regarding damage to the lands comprising the Preserve and the flooding of Black/Clear Lake that the plaintiff contends is caused by the higher water level in Pool 3. *See* Pl.'s Opp. to Def.'s Mot. at 9 ("plaintiff's land contiguous to the Lake had been damaged by flood waters caused by the inability to control the water level of the Black/Clear Lake"); Pl.'s Opp. to Def.'s Mot. at 33 ("Black/Clear Lake has been damaged by an increased water table, which becomes recurrent flooding when it rains"); Pl.'s Supp. Br. at 7 ("plaintiff has experienced a drastic increase in land flooding from the Lake as a result of the raising of the water level of Pool 3"); Pl.'s Supp. Br. at 33 (characterizing the damage as "an invasion of the property by a raised water table and the backwater effect from Pool 3").

A. To the Extent the Plaintiff Asserts a Taking of the Ability to Drain Black/Clear Lake into the Red River, that Interest Is Subservient to the Navigational Servitude.

The government's power to regulate navigation clearly supersedes any property interest claimed in the

entire navigable stream and the stream bed below the ordinary high-water mark. *See, e.g., Rands,* 389 U.S. at 123. Furthermore, the Supreme Court has on numerous occasions held that a property owner's use or value that "arises from access to, and use of, navigable waters" is subject to the navigational servitude. *Id.* at 124-25; *see also Kaiser Aetna,* 444 U.S. at 177; *Twin City Power Co.,* 350 U.S. at 225; *Willow River Power Co.,* 324 U.S. at 503. Other courts have employed similar reasoning. *See, e.g., Borough of Ford City,* 345 F.2d at 653; *City of Eufaula,* 313 F.2d at 747; *City of Demopolis,* 334 F.2d at 659. Therefore, the government is correct that, to the extent the plaintiff bases its takings claim on the ability to drain from Black/Clear Lake into the Red River, which requires the elevation of the Red River to be below a certain level, the plaintiff's property interest is subservient to the navigational servitude.

The plaintiff's argument that the navigational servitude does not extend to lands outside of the riverbed, and its reliance on *Cooper,* are misplaced with regard to its property interest in the ability to drain Black/Clear Lake into the Saline Bayou, and ultimately into the Red River. Here, the plaintiff seeks damages for the alleged taking of its ability to drain Black/Clear Lake to control aquatic growth. This ability is dependent on the flow and the level of the Red River, and the characteristics of the Red River entirely within the riverbed and below the OHWM. In *Cooper,* the court awarded damages for the flooding of fast lands that were owned by the plaintiffs and located along a navigable river. The plaintiff does not seek damages for the

flooding of fastlands, but instead for the taking of the ability to drawdown Black/Clear Lake. Accordingly, *Cooper* does not apply to the plaintiff's claim.

Similarly, the plaintiff's reliance on *Tri-State Materials* is inapposite. In *Tri-State Materials*, the court determined that the plaintiff was entitled to compensation because its property, located outside the riverbed, was flooded as a result of action taken by the government to raise the water level of a navigable river. The court rejected the government's invocation of the navigational servitude for two reasons, stating:

> First, the lands at issue are not part of the bed of a navigable stream and are, therefore, outside the normal scope of the navigational servitude. Second, *since the value claimed to have been taken does not derive from access to or use of a navigable stream*, the navigational servitude does not serve to limit the amount of damages.

Tri-State Materials, 550 F.2d at 5-6 (emphasis added). The plaintiff apparently seeks compensation for the taking of its ability to draw down Black/Clear Lake, which, in contrast to the situation in *Tri-State Materials*, is a value that *does* "derive from access to or use of a navigable stream." The plaintiff's ability to use the Dam to drain water from Black/Clear Lake was dependent on the level of the Red River and the Saline Bayou being below the OHWM. The level of the Red River at Pool 3 was raised as part of the Red River Navigation Project,

which was implemented with the goal of improving the Red River's navigability. Accordingly, under the test established by the Supreme Court in *Willow River Power Co.*, 324 U.S. at 502-03, which has been consistently held to bar claims in which the property interest is dependent on the use of a navigable waterway, the plaintiff's property interest in drawing down Black/Clear Lake by releasing water into the Red River arose from access to, and use of, the Red River, a navigable body of water, and that interest is thus subject to the navigational servitude. The plaintiff's takings claim based on this interest is not compensable and must be dismissed.

B. To the Extent the Plaintiff Can Establish Damages Resulting from "Physical Interference" by the Red River, the Plaintiff May Have Stated a Claim upon Which Relief Could Be Granted.

As delineated *supra*, the plaintiff in its pleadings makes numerous allegations of damage to the lands comprising the Preserve and the flooding of Black/Clear Lake that the plaintiff contends is caused by the increased water level in Pool 3. In particular, the plaintiff references the "backwater effect from Pool 3" and "recurrent flooding" of the lake and surrounding land. While, as discussed above, the navigational servitude does extend to rights that derive from the use of or access to navigable waters, the navigational servitude does not extend to the taking of property by means of backwater flowing from a navigational body of water.

The Supreme Court first made this distinction in *United States v. Cress*, 243 U.S. 316 (1917). In *Cress*, the Court held that the government was liable for damages to private lands caused by consistent flooding that resulted from the raising of two rivers to improve their navigability. *Id.* at 327. The Court stated:

> The findings, however, render it plain that this is not a case of temporary flooding or of consequential injury, but a permanent condition, resulting from the erection of the lock and dam, by which the land is "subject to *frequent overflows of water from the river.*" That overflowing lands by permanent backwater is a *direct invasion*, amounting to a taking, is [well-settled]. . . . There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.

Id. at 327-28 (internal citations omitted) (emphasis added). The Court also distinguished its reasoning from that employed in cases " *where no water was thrown back on claimant's land*, and the damage was confined to an interference with the access thence to the navigable portion of the river." *Id.* at 327 (emphasis added).

Appendix B

In *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 802 (1950), the Court relied on *Cress* to find that a landowner was entitled to compensation for the destruction of his property due to "undersurface invasion" from a navigable river nearby. The Court found that the land at issue "was permanently invaded by the percolation of the waters from both the river and its tributary." *Id.* at 810. The Court further stated:

> "Whether the prevention of the use of the land for agricultural purposes was due to its invasion by water from above or from below, it was equally effective. *The destruction of land value, without some actual invasion of the land and solely by preventing the escape of its own surface water, is not before us.*"

Id. (emphasis added). Each of these cases awarded compensation to landowners for a direct physical invasion of their land by water originating in a navigable river. In *Cress*, the plaintiff's property was flooded by backwater. In *Kansas City Life Ins.*, the plaintiff's property was flooded by subsurface water. The common factor in both cases is that the damage to the plaintiffs' property resulted from a *physical invasion* by the government of the plaintiffs' land.

In this case, the plaintiff has alleged that backwater from Pool 3 and other flooding has damaged Black/Clear Lake and the Preserve. While it is difficult to fully understand how the raising of Pool 3 has resulted in a "physical invasion" of the plaintiff's property by either

backwater or subflooding from the Red River, if the plaintiff's allegations are accurate, then the plaintiff may have stated a claim for relief that would not be subject to the navigational servitude. If the plaintiff can demonstrate that its property interest has been taken by the government due to a direct physical invasion of water from the Red River, which has resulted in higher water levels in Black/Clear Lake or flooding of the surrounding lands, the plaintiff may be entitled to compensation. Accordingly, with regard to these contentions, judgment on the pleadings is not appropriate and the plaintiff will be given an opportunity to establish its claim for a taking based on a physical invasion of its property interest.

CONCLUSION

For all of the foregoing reasons, the government's motion is **GRANTED-IN-PART** and **DENIED-IN-PART.** The parties are **ORDERED** to complete fact discovery on the effect of the government's action on the plaintiff's alleged property interest. The parties shall file a joint status report, if they can agree, or separate status reports if they cannot agree, by **Thursday, November 15, 2007** proposing the next steps in this litigation.

IT IS SO ORDERED.

s/ Nancy B. Firestone
Nancy B. Firestone
Judge